IN THE

Supreme Court of the United States

October Term 1963

No. 81

NATIONAL EQUIPMENT RENTAL, LTD.,

Petitioner,

—against—

STEVE SZUKHENT and ROBERT SZUKHENT,

Respondents.

RESPONDENTS' BRIEF ON APPEAL

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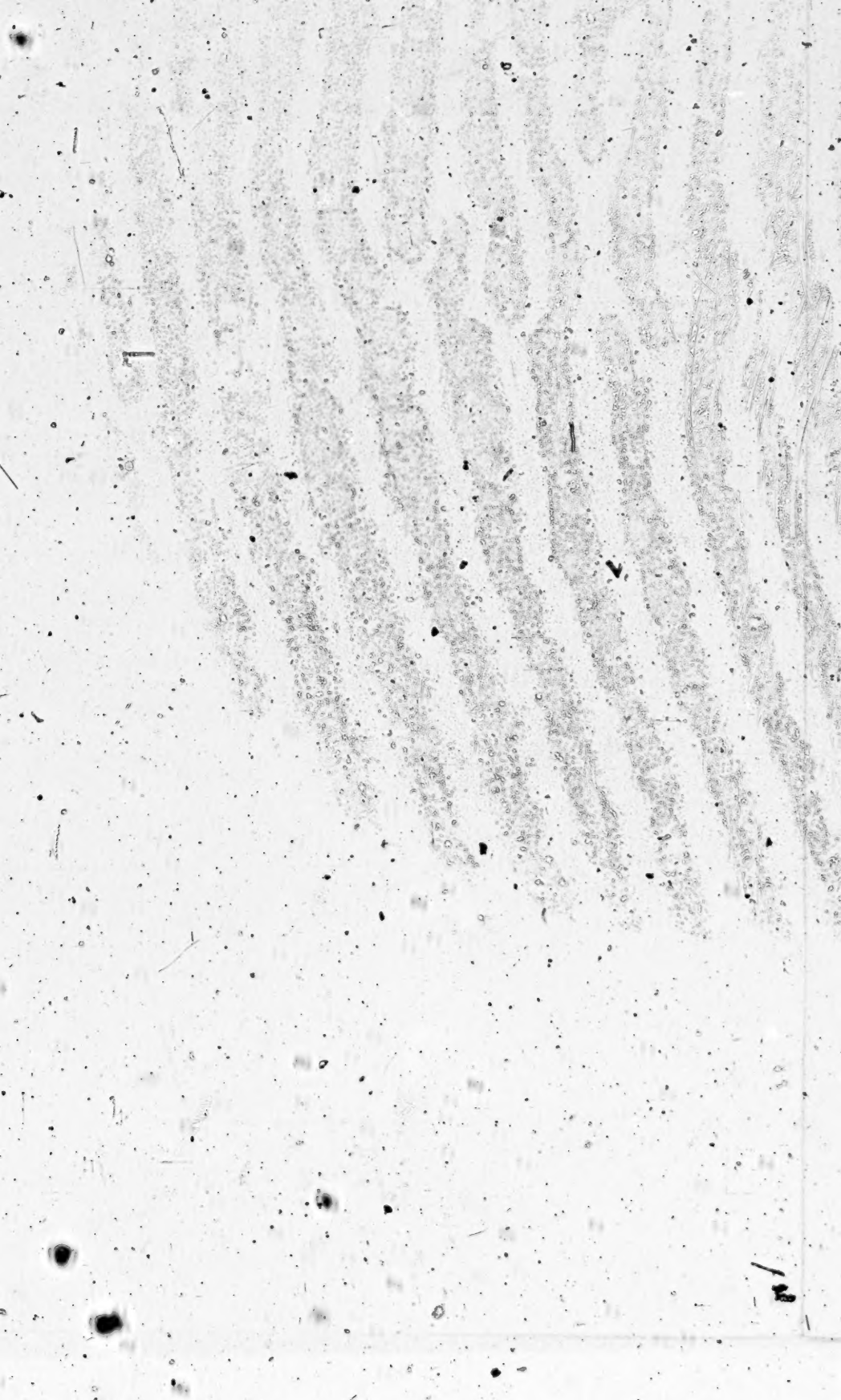

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Statutory Provision

1: Federal Rules of Civil Procedure, Rule 4 (d) (1):

"(d) Summons: Personal Service * * *. Service shall be made as follows:

(1) Upon an individual * * * by delivering a copy of the summons and of the complaint to an agent authorized by appointment * * * to receive service of process."

Question Presented

Is a person, who is unknown to respondents, and whose personal interest is diametrically opposed to respondents, and who is not obligated to act as agent, a valid agent of respondents to accept service of process; even though she be designated as such agent in a printed form contract. And must the contract, itself, require that respondents be notified of such service, in spite of the fact that respondents were notified in this instance.

Statement

Respondents are farmers residing in Flushing, Michigan. Petitioner sues for $23,713.00, of which, $3,093.00 it claims as attorney's fees for alleged breach of a written lease. It leased certain equipment to the respondents concerning which respondents had no knowledge and which it fraudulently represented to them would accomplish certain beneficial results for respondents.

The petitioner attempted service on the respondents pursuant to a printed provision in the lease which read as follows:

> "The lessee hereby designates Florence Weinberg, 47-31 Forty-First Street, Long Island City, N. Y. as agent for the purpose of accepting service of any process within the State of New York".

On January 24, 1962, a copy of the summons and complaint for each defendant was served on Florence Weinberg and thereafter mailed to respondents in Michigan.

Nowhere in the lease was there any provision requiring that a copy of the summons and complaint be forwarded to the respondents by such putative agent.

This alleged agent is the wife of one of the officers of the petitioner and is unknown to respondents. An application was made to quash such service. No attempt was made to go into the merits of the controversy because of insufficient time to ascertain the facts, and since the service had nothing to do with the merits. It is a great hardship for these two farmers, father and son, to travel to New York, stay at a hotel, and pay for their witnesses to come to New York. For petitioner it is a simple matter. Its representative

came to Michigan to sell the farmers the rental of the equipment. That is its business. Petitioner inserted such a provision because it knows the farmers cannot come here to protect themselves.

ARGUMENT

1. The service of the summons and complaint is void.

The provision, in the lease appointing Florence Weinberg, respondents' agent for the acceptance of service of process, does not contain any provision requiring that she mail such process to respondents. She could have kept it or thrown it away. She was under no obligation to mail it. The mere fact that it was mailed does not alter the situation. The question is not what she did but what she was required to do.

This question was decided by the United States Supreme Court in *Wuchter* v. *Pizzutti*, 276 U. S. 13, 48 S. Ct. 259. In this case Pizzutti recovered a judgment against Wuchter for personal injuries sustained by him due to the operation of Wuchter's auto in New Jersey. Wuchter resided in Pennsylvania and Pizzutti in New Jersey. Process was served on Wuchter by leaving it with the Secretary of State of New Jersey pursuant to the laws of New Jersey. Although this statute did not require service on the defendant Wuchter, nevertheless he was actually served personally in Pennsylvania but he did not appear, and final judgment was entered.

The Court held such service was void because the statute did not itself direct that process be forwarded to the defendant. It stated on page 19:

> ". . . but the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice".

And further on at page 24 it stated:

> "But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it;" citing cases.

Petitioner fails to distinguish between the right to subject one's self to another jurisdiction and the right to be apprised that such jurisdiction has been properly invoked against him.

2. No valid agency had been created for acceptance of service on behalf of respondents.

The so called agent is not in reality an agent of respondents but of petitioner.

The petitioner at the time of the argument of the motion informed the Court that she is the wife of one of the officers of the petitioner. No disclosure was made as to any other interest she may have in the corporation although inquiry was made at that time by the Court. She even may be a stockholder and/or director. She is unknown to respondents. It is obvious that she is there to protect the interests

of petitioner not respondents, and thus is engaged in a capacity that is repugnant to the law.

An agent generally cannot represent both parties to a transaction or serve as an agent in a matter in which his personal interest is diametrically opposed to that of his principal. *Carr v. National Bank*, 167 N. Y. 375; *Girardi* v. *Irving*, 186 App. Div. 564, 174 N. Y. Supp. 701.

Rule 4 (d) (1) of the Federal Rules of Civil Procedure contemplates a real agent of a person not a fictitious one.

Agents cannot take upon themselves incompatible duties and characters or become agents in a transaction where they have an adverse interest or employment.

Respondents were not informed of the putative agent's close relationship to petitioner. The so called agent was acting under the supervision and control of petitioner not respondents.

Also as the lease was a fixed printed form prepared by the petitioner and tendered to the respondents, it must be construed most strongly against the petitioner. See *Aschenbrenner* v. *U. S. Fidelity & Guarantee Co.*, 292 U. S. 80, 54 S. Ct. 590; *Grayee* v. *American Insurance Company*, 109 U. S. 278.

See Kessler; Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Col. L. 12. 629 and Llewellyn, Book Review, 52 Harv. L.R. 700.

As Kessler stated on p. 632, standard contracts are typically used by enterprises with strong bargaining power. The weaker party in need of the goods or services, is frequently not in a position to shop around for better terms,

either because the author of the special contract has a monopoly (natural or artificial), or because all competitors use the same clauses. His contractual intention is a subjection more or less voluntary to terms dictated by the strong party, terms whose consequences are often understood only in a vague way, if at all.

Referring to insurance as an illustration, he states p. 633, "Handicapped by the axiom that Courts can only interpret but cannot make contracts for the parties, Courts had to rely heavily on their prerogative of interpretation to protect policy holders. Courts have shown a remarkable skill in reaching 'just' decisions by construing ambiguous clauses against their author even in cases where there was no ambiguity."

Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords, enabling them to impose a new feudal order of their own making upon a vast horde of vassals.

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted,

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